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Supreme Court of the United States

OCTOBER TERM, 1965

SENFOUR INVESTMENT CO., INC., *Appellant,*

vs.

KING COUNTY,
a Legal Subdivision of the State of Washington,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM AND APPELLEE'S BRIEF

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THE ARGUS PRESS SEATTLE, WASHINGTON

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MOTION TO DISMISS OR AFFIRM AND APPELLEE'S BRIEF

This motion and brief is submitted pursuant to authority granted by the court on May 17, 1966.

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the Supreme Court of the State of Washington be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

MOTION TO DISMISS

Alternatively, appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final judgment of the Supreme Court of the State of Washington be dismissed on the ground that it does not present a substantial federal question.

OPINION BELOW

The case below is King County Superior Court Cause No 609562, being an action to recover an excise tax assessed under the terms of Revised Code of Washington 28.45 and King County Resolution (Ordinance) No. 25672. The State Supreme Court decision is reported at 66 Wash. Dec. 2d 629, 404 P.2d 760.

QUESTIONS PRESENTED

Appellant accurately states the question presented at pages 3 and 4 of the Jurisdictional Statement.

STATUTES INVOLVED

The statutes involved are Revised Code of Washington 28.45.050 reproduced at Appendix B of the Jurisdictional Statement; and Sections 667 and 671, Title 11, United States Code, reproduced at page 8 below:

STATEMENT

There is no dispute as to the facts.

(a) The Pleadings – Complaint

The complaint (R.0001) alleges "that the sale (of real estate) was pursuant to a plan of liquidation of the Heart of Seattle Hotel," such sale being by "Jay G. Larson, acting as Trustee in Reorganization of the Heart of Seattle Hotel Co., Inc," in United States District Court Cause No. 51268.

King County Treasurer assessed a real estate excise transfer tax of $3,000 on September 3, 1963, under the

terms of Revised Code of Washington 28.45 and the appropriate county ordinance.

Larson paid this sum and has assigned his claim to plaintiff.

Paragraph V of the claim states that the transaction is immune from taxation under the National Bankruptcy Act.

(b) The Answer

The amended answer (R.0003) is that the transaction was an arrangement and is taxable under the terms of Title 11, Section 671, U.S. Code.

(c) The Evidence

Defendant's request for admission (of authenticity of documents) (R.0007, et seq.) contains first the assessment of Tax E 526511, showing the real property description, the parties to the transfer, the tax assessed and the fact that $3,000 was paid on September 3, 1963.

The County Resolution No. 25672, dated April 15, 1963, effective for the year commencing May 1, 1963, was put in evidence.

The abstractor's line abstract on the real estate transferred shows documents recorded from October 5, 1961, to November 13, 1963. The instrument which enabled the Treasurer to make his assessment is No. 57, the warranty deed.

Instruments 1 through 6 place the title to the real

estate in Heart of Seattle Hotel Co., Inc., the last being recorded November 24, 1961.

The bankruptcy arrangement proceedings shown on item 60 as having been commenced February 7, 1963, after numerous chattel mortgages and more laborers' and materialmen's liens were filed up to January 29, 1963.

R.0009-.0021 is the Federal Court's order in USDC No. 51268 of August 13, 1963, approving the plan of arrangement. This shows the proceeding is under Chapter X of the Bankruptcy Act. Attached to the order is Exhibit A, the "amended Plan of Reorganization" of Heart of Seattle Hotel Co., Inc. The plan proposes that a "third party, corporate or otherwise" purchase all assets and pay all debts, according to class, except the $750,000 mortgage (then in favor of Exchange Bank & Trust Company), the chattel mortgage and conditional sale as follows:

½ the unsecured claims not exceeding	$ 55,000.00
Plus notes for the balance	55,000.00
Cash to pay costs of administration and fees of reorganization in excess of	5,000.00
Federal taxes	28,000.00
Wage Claims	7,700.00
Materialmen's claims	13,500.00
Lease payments	5,300.00
	$169,500.00

The property was ordered transferred subject to:

Mid-Continent Investment Co. mortgage	$750,000.00
Kamins Furniture Chattel Mortgage balance	165,113.16
Conditional Sale contract of Dohrman Hotel Supply	41,422.69
	$956,535.85

The order confirming the plan of arrangement discloses that the "third party" is plaintiff and has been formed "to purchase the assests of the debtor."

The trial court granted plaintiff's (appellant's) motion for summary judgment and awarded judgment against the county for $3,000 plus interest.

The Washington State Supreme Court reversed the trial court and dismissed the complaint in an opinion (R.0022-0026) which became final on October 25, 1965 by return of the Remittitur to the Superior Court (R.0028).

ARGUMENT

This is a transfer tax and permission to assess the tax is granted by Section 671 of the National Bankruptcy Act.

Unquestionably, a transfer occurred by delivery of the warranty deed on September 3, 1963, and the consideration therefor appears in the specification of the amount of new cash to be paid by plaintiff.

R.C.W. 28.45.030 provides:

> "As used in this chapter, the term 'selling price' means the consideration, including money or any-

> thing of value, paid or delivered or contracted to be paid or delivered in return for the transfer of the real property or estate or interest in real property, and shall include the amount of any lien, mortgage, contract indebtedness, or other incumbrance, either given to secure the purchase price, or any part thereof, or remaining unpaid on such property at the time of sale."

The ordinance is identical.

Therefore, when a substantial consideration is paid, here in excess of $169,500.00, there can be no deduction of the price of a real estate mortgage lien.

No challenge was made directly to this value basis.

The Bankruptcy Act is so clearly permissive here that no substantial federal question exists meriting further argument.

No contention was made in the state courts that the transfer tax is in legal fact a stamp tax prohibited by Section 667 of the Bankruptcy Act. Washington courts have consistently held the tax to be an excise on the act of transfer.

Subject to nuances of local interpretation, the following states appear to have a similar tax of apparent similar applicability: Delaware, Hawaii, Massachusetts, Pennsylvania, Tennessee, and West Virginia. Typically, evidence must appear on the face of the deed that the tax has been assessed and paid (if not exempt) before recording is permitted.

According to Commerce Clearing House, the following states prescribe documentary stamp taxes on deeds and mortgages: Alabama, District of Columbia, Florida, Kansas, Maryland, Minnesota, Mississippi, Nebraska, New York, Oklahoma, South Carolina, Tennessee, Virginia, and Washington (R.C.W. 82.20, 1935). The Federal Stamp Tax is the Act of June 13, 1898 (C. 448, 30 Stat. 448, 460).

The Washington Supreme Court, in *Mahler v. Tremper, King County Treasurer* (1953), 40 Wn.2d 405, 411; 243 P.2d 627, stated that the prohibition against recordation is an enforcement procedure to collect the tax on the transfer.

The Bankruptcy Act is organized as follows by Chapters:

I. Definitions.
II. Creation of Courts of Bankruptcy and their jurisdiction.
III. Bankrupt.
IV. Courts and procedure therein.
V. Officers, their duties and compensation.
VI. Creditors.
VII. Estates.
VIII. Railroad reorganizations.
IX. Debt readjustments by municipalities and taxing districts.
X. Corporate reorganizations.
XI. Arrangements.

XII. Real property arrangements.

XIII. Wage earner's plan.

The first seven chapters provide the so-called "full" or "straight" bankruptcy, by which the bankrupt surrenders his property in return for a defense against his debts.

The plans of Chapters VIII through XIII make use of portions of the federal bankruptcy powers and general equity powers of the courts.

Of course, no part of the Bankruptcy Act becomes operable unless insolvency exists, that is, (1) liabilities exceed assets or (2) the person is unable to pay his debts as they mature.

As was said by Circuit Judge Parker in *Campbell v. Alleghany Corporation*, 75 F.2d 947, "the power granted Congress over the subject of bankruptcies is plenary." 6 Collier on Bankruptcy (14th ed.) 95.

Sections 667 and 671, Title II US Code define all tax liability in a Chapter X proceeding.

Sec. 667:

> "The issuance, transfer, or exchange of securities, or the making or delivery of instruments of transfer under any plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or of any State."

Sec. 671:

"Any provision in this chapter to the contrary notwithstanding, all taxes which may be found to be owing to the United States or any State from a debtor within one year from the date of the filing of a petition under this chapter and have not been assessed prior to the date of the confirmation of a plan under this chapter, and all taxes which may become owing to the United States or any State from a receiver or trustee of a debtor or from a debtor in possession, shall be assessed against, may be collected from and shall be paid by the debtor or the corporation organized or made use of for effectuating a plan under this chapter: *Provided, however,* That the United States or any State may in writing accept the provisions of any plan dealing with the assumption, settlement, or payment of any such tax."

In the state courts, counsel argued that the precise form of reorganization was in fact a liquidation, and therefore the state should not be permitted to hinder, harass, or impede a Federal order of bankruptcy liquidation, by taxing a transfer prescribed by such order.

Appellee argued that the phrase "all taxes which may be found to be owing" of Sec. 671 means "all taxes" including levy of an excise tax on an event of transfer.

It is appellee's position that reorganization is not liquidation, and that the rationale of the liquidation cases has no application to Chapter X principles of taxation.

In *Fidelity Assurance Assn. v. Sims* (1943) 318 U.S. 608, 621, the court said:

"It was suggested at the bar that, even if liquidation is all that can be hoped, this would be better managed by a single bankruptcy court than in several

separate proceedings. The difficulty with the suggestion is that Congress did not intend resort to Chapter X to be had for the mere purpose of liquidation. The scheme of the chapter precludes any such conclusion. The mandate of § 144 is clear that unless the judge is satisfied the petition was filed in good faith he must dismiss it. Under the predecessor of Chapter X — § 77B of the Bankruptcy Act — the district judge was given authority, by subsection (c) (8), under certain circumstances, to 'direct the estate to be liquidated, or direct the trustees to liquidate the estate . . .' In Chapter X, on the other hand, § 236 (2) provides that if no plan is approved or accepted, or if it is not consummated, the judge may, after hearing all persons in interest, adjudge the debtor a bankrupt or dismiss the proceeding, as he may decide is in the interest of creditors and stockholders. Thus the statute does not contemplate a liquidation in a Chapter X proceeding but a liquidation in ordinary bankruptcy or a dismissal outright.

* * *

"Congress did not intend a Chapter X case to be turned into a liquidation proceeding at the outset, but intended the litigation to become a straight bankruptcy only after the failure to consummate a plan, and meant to limit the parties to their remedy in ordinary bankruptcy in all other cases. It would, therefore, be a perversion of the Congressional intent to treat the present as a liquidation proceeding, since the rights of persons having liens or security pledged for their claims differ widely in the two sorts of bankruptcy."

Decisions, such as *California State Board of Equalization v. Goggin* (1957), 245 F.2d 44, relating solely to "ordinary" or full bankruptcy, have no application in the instant case.

It will be noted that in the first seven chapters of the Act, there is no mention of taxes except as to classification of priorities – Sec. 64 (a) (4), and as to taxes on operation of a business. The immunity discovered by Judge Fee in the *Goggin* cases, *supra,* is purely one of decisional law.

The only prohibited excise tax is the stamp tax, and all other state taxes must be paid.

In the arrangement chapters, however, Congress has directed the payment of "all taxes," withdrawing therefrom only documentary taxes.

Congress having selected for immunity only this one category of tax from the multitude of different types of taxes, we must assume that "all taxes" means all other taxes.

Imposition, at one time or another of these types of taxes has been sustained by the courts: State income taxes (including adjustments), *Redwine v. Citizens & Southern National Bank* (CA 5, 1951) 189 F.2d 328. County real and personal property ad valorem taxes; *Berryhill v. Gertsel* (CA 5 1952) 196 F.2d 304. State unemployment compensation tax, *In re Lambertville Rubber Co.* (DC NJ 1936) 27 F. Supp. 897 (Modified on other grounds, 111 F. 2d 45). Corporate franchise taxes; *In re Pressed Steel Co. of New Jersey* (1938) 100 F. 2d 147.

Sections 667 and 671 are part of the Chandler Act. As Collier on Bankruptcy (Vol. 6, p. 5147) observes, the

old composition scheme referred only to Federal taxes, and the 1938 amendment simply added the words "or any state" to Sec. 671 to eliminate the free ride reorganizing corporations had gotten by avoidance of all state taxes.

The prohibition against state stamp taxes first appeared in Sec. 667. 6 Collier on Bankruptcy (14th ed.) p. 5148. Obviously, it would have been surplusage to prohibit specially (the state stamp tax) where the prohibition existed generally (all state taxes).

Nevertheless, Congress did touch in 1938 specially on the subject of state stamp taxes. We assume that such specificity reinforces the generality as to other taxes prescribed in Sec. 671. The rule *"expressio unius est exclusio alterius"* is even more applicable where the exclusion is express. See *Bradley v. Department of Labor and Industries* (1958) 52 Wn.2d 780, 784, 329 P. 2d 196 for a discussion of the rule. *"Ejusdem generis"* does not work in reverse. *Republic Investment Co. v. Naches Hotel Co.* (1937) 180 Wash. 176, 181, 678 2d 858.

The Washington courts have consistently held this tax is on the act of transfer. "If the event is a taxable one, it must be held to be such because it constitutes a 'conveyance ... for a valuable consideration' ". *Deer Park v. Stevens County* (1955), 46 Wn.2d 852, 855; 286 P. 2d 98. "We held the distribution was a taxable event . . . by reason of an assumption by the stockholder of the cor-

poration's liabilities". *The Doric Company v. King County* (1959), 57 Wn.2d 640, 643; 358 P. 2d 972. "We conclude that the transactions . . . constituted transfers of ownership for a valuable consideration". *Christensen v. Skagit County* (1965) 66 Wash. 2d. 73, 401 P. 2d 334.

The Washington courts have so clearly and correctly defined the excise tax as on the event of transfer, and such form of tax is within the definition of "any state tax" authorized by Sec. 671 of the Act, we submit no substantial federal question exists and the appeal ought to be dismissed without further argument.

Alternatively, the Washington Supreme Court decree may be affirmed for the same reasons.

Respectfully submitted,

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